Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-1303

CARL D. BISHOP,

Petitioner,

v.

W. H. WOOD, CHIEF OF POLICE OF THE CITY OF MARION, NORTH CAROLINA; VICTOR DENTON, CITY MANAGER OF THE CITY OF MARION, NORTH CAROLINA; and THE CITY OF MARION, NORTH CAROLINA, A MUNICIPAL CORPORATION,

Respondents.

****

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR
THE FOURTH CIRCUIT

****

PETITION FOR WRIT OF CERTIORARI

****

Norman B. Smith
Smith, Carrington, Patterson,
Follin & Curtis
704 Southeastern Bldg.
Greensboro, N. C. 27401

Counsel for Petitioner

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Counsel for Petitioner

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ON WRIT OF CERTIORARI
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PETITION FOR WRIT OF CERTIORARI

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered on January 31, 1975.

CITATIONS TO OPINIONS BELOW

The January 31, 1975, opinion of the United States Court of Appeals for the

Fourth Circuit is not published. This opinion was rendered after a rehearing en banc. The initial opinion of the United States Court of Appeals for the Fourth Circuit is published at 498 F.2d 1341 (1974). This action originated in the United States District Court for the Western District of North Carolina. The judgment of the United States District Court for the Western District of North Carolina is published at 377 F.Supp. 501 (1973). The two court of appeals decision and the district court decision are set out in the Appendix hereto, pp. 12-30.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on January 31, 1975. Jurisdiction of this court is invoked under 28 U.S.C. sec. 1254(1). Jurisdiction of the court of first instance in the United States District Court for the Western District of North Carolina, was founded upon 42 U.S.C. sec. 1983, 28 U.S.C. sec. 1343(3), and 28 U.S.C. sec. 1331(a).

QUESTIONS PRESENTED

1. Whether a regular full-time public employee, who has completed his probationary period and has become a permanent employee, can be discharged without notice and hearing.

2. Whether a publicly employed policeman can be dismissed without notice and hearing, when charged with not following orders, insubordination, causing low morale and committing conduct unsuited

to an officer.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

CONSTITUTION OF THE UNITED STATES

Amendment XIV.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner, a former police officer of the City of Marion, North Carolina, brought an action in the United States District Court for the Western District of North Carolina, Shelby Division, against respondents, W. H. Wood, Chief of Police, Victor Denton, City Manager, and the City of Marion, North Carolina, under 42 U.S.C. sec. 1983, contending that his rights under the Fourteenth Amendment were violated when he was discharged from his police job. He sought

an order requiring respondents to re-employ him and a monetary award of damages from date of discharge to date of judgment. (R. 2-6).

Cross-motions for summary judgment were filed. The district court granted respondents' motion for summary judgment and dismissed the action by order entered August 29, 1973. (Appendix hereto, pp. 12-24. The United States Court of Appeals for the Fourth Circuit in its initial decision of June 21, 1974, adopted per curian the judgment of the district court, over the dissent of Circuit Judge Winter. (Appendix hereto, pp. 25-29). A petition for rehearing en banc was granted by the Court of Appeals, and on January 31, 1975, an order was entered affirming the judgment of the district court "by an equally divided court." Appendix hereto, p. 30).

Petitioner was employed by the City of Marion, North Carolina, as a police officer on June 9, 1969. He was discharged from this employment on March 31, 1972. (R. 39). The reasons for petitioner's discharge were stated by respondent Chief of Police W. H. Wood to include insubordination, causing low morale, conduct unsuited to a police officer, refusal to cooperate with fellow officers, and violation of orders from supervisors. (R. 18-19). Each of these charges was specifically rebutted in affidavits offered by petitioner (R.22-26, 33-36), so that on summary judgment the court was not permitted to find that there was just cause for petitioner's discharge.

All policemen newly employed by the City of Marion serve a six-month probationary period, and afterward they are considered permanent employees. (R. 11, 14). The Personnel Ordinance of the City of Marion provides in pertinent part:

> A permanent employee whose work is not satisfactory over a period of time shall be notified in what way his work is deficient and what he must do if his work is to be satisfactory. If a permanent employee fails to perform work up to the standard of the classification held, or continues to be negligent, inefficient, or unfit to perform his duties, he may be dismissed by the City Manager. Any discharged employee shall be given a written notice of his discharge setting forth the effective date and reasons for his discharge if he shall request such a notice. (R. 4, 8).

By affidavits respondents contended that petitioner was corrected and criticized on various occasions, and thus implicitly warned of the possible loss of his job. (R. 17-18). However, these assertions are all vigorously denied by affidavits submitted on behalf of petitioner, including specific denials that his conduct was in any way questioned or criticized, and proof that petitioner was cooperative with fellow employees, obedient to his superiors, and that he conducted himself as a policeman in a thoroughly professional manner. (R. 22-37).

REASONS FOR GRANTING THE WRIT

I. A REGULAR FULL-TIME PUBLIC EMPLOYEE, WHO HAS COMPLETED HIS PROBATIONARY PERIOD AND HAS BECOME A PERMANENT EMPLOYEE, CANNOT BE DISCHARGED WITHOUT NOTICE AND HEARING.

In addition to job security rights under tenure laws, during the terms of employment contracts, and where the right to employment is grounded in statutes, this Court held in Board of Regents v. Roth, 408 U.S. 564, 567-78, n.16 (1972), and Perry v. Sindermann, 408 U.S. 593, 601-02 (1972), that public employees have a property interest in continued public employment, requiring notice and hearing before dismissal wherever:

(a) There is a clearly implied promise of continued employment;

(b) The employment practices in question have evolved into a "common law" of continued employment; or

(c) There is any other situation in which an employee has an objective expectation of continued employment (more than an abstract need, desire, or unilateral expectation of continued employment).

The procedures and ordinances of the City of Marion provide that newly hired policemen are probationary employees for

six months, at which time they become permanent employees. The ordinances provide that a permanent employee may be discharged only if he "fails to perform work up to the standard of the classification held, or continues to be negligent, inefficient, or unfit to perform his duties [after he has been first 'notified in what way his work is deficient and what he must do if his work is to be satisfactory']."

These provisions surely seem to amount to an implied promise of continued employment or to give rise to an objective expectation of continued employment, in fulfillment of the requirement of Board of Regents v. Roth and Perry v. Sindermann. If these "implied tenure" relationships, which are held to give rise to a pre-discharge notice and hearing, are to have any continued validity at all, they ought to be respected in the present case. The decision of the United State Court of Appeals for the Fourth Circuit in this respect appears to be a decision of a federal question in a way in conflict with applicable decisions of this Court. Supreme Court Rule 19(b).

A review of lower court decisions reveals a distressing lack of uniformity in dealing with due process rights of public employees who are subject to "implied tenure" arrangements. Compare Zimmerer v. Spencer, 485 F.2d 176 (5th Cir. 1973), where a public employee was held to have due process rights after being employed for six years, without a tenure system, but under a practice

of placing the employee on probation if contract non-renewal was contemplated; with Abeyta v. Town of Taos, 499 F.2d 323 (10th Cir. 1974) where the absence of either a contract or a fixed term of employment was held to preclude policemen's due process rights. [1]

It is important that the Court grant certiorari in this case, to reassert and clarify the pre-discharge notice and hearing requirements stemming from "implied tenure" public employment relationships. The conflicts between the decision of the United States Court of Appeals for the Fourth Circuit, and courts of appeals and district courts in the other circuits, on this subject ought to be resolved in the present case. Supreme Court Rule 19(b).

1. Compare also Puckett v. Mobile City Commission, 380 F.Supp. 593 (S.D.Ala. 1974) (Policemen without express tenure have procedural due process rights.) with Smetanka v. Borough of Ambridge, 378 F. Supp. 1366 (W.D.Pa. 1974) (Non-civil service police employees can be dismissed without notice and hearing.).

II. A PUBLICLY EMPLOYED POLICEMAN CANNOT BE DISMISSED WITHOUT NOTICE AND HEARING, WHEN CHARGED WITH NOT FOLLOWING ORDERS, INSUBORDINATION, CAUSING LOW MORALE AND COMMITTING CONDUCT UNSUITED TO AN OFFICER.

In Board of Regents v. Roth, 408 U.S. 564, 573 (1972), it was established that a public employee's right to liberty is violated, when he is discharged without notice and hearing, after having been accused of misconduct. The Court said, "The State, in declining to hire the respondent, did not make any charge against him that might seriously damage his standing and associations in the community. It does not base the non-renewal of his contract on a charge, for example, that he had been guilty of dishonesty, or immorality. Had it done so, this would be a different case. For '[w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential.'"

The record shows that in this case that respondents' alleged reasons for discharging petitioner were that he was insubordinate, caused low morale, engaged in conduct unsuited to a police officer, refused to cooperate with other officers, and violated orders of his supervisors. As Circuit Judge Winter correctly said in his dissenting opinion, "Accusations of this nature made against

one engaged in the occupation of a law enforcement officer manifestly have a severe adverse impact upon future employment opportunities, and it can be reasonably expected that defendants would disclose these reasons upon the request of a person considering plaintiff's employment who inquired of the respects in which plaintiff's work had been found unsatisfactory. To my mind, it therefore follows that procedural due process should apply, and as a minimum, plaintiff should have been given notice of and afforded an opportunity to refute the charges before he was dismissed" (Appendix hereto, p. 28).

Other lower court decisions appear consistently to support petitioner's position on this part of the case. Pre-discharge notice and hearing were held to be required on the basis of stigmatizing charges, for example, in Sims v. Fox, 492 F.2d 1088 (5th Cir. 1974)(unfitness and unsuitability), and Simmonds v. Government Employees' Service Commission, 375 F.Supp. 934 (D.C.V.I. 1974)(insubordinate and continuing to fail to comply with rules and regulations).

The court below, therefore, has decided a federal question in a way in conflict with applicable decisions in this Court, so that certiorari should be granted. Supreme Court Rule 19(b).

CONCLUSION

For the reasons set forth above, petitioner prays that the Petition for Certiorari be granted.

Respectfully submitted,

Attorney for Petitioner *
Norman B. Smith
Smith, Carrington, Patterson
Follin & Curtis
704 Southeastern Building
Greensboro, N. C. 27401
Telephone: (919) 274-2992

* Prosecution of this proceeding is sponsored by the North Carolina Civil Liberties Union Legal Foundation, Inc.

APPENDIX

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NORTH CAROLINA

SHELBY DIVISION

CIVIL NO. SH-72-78

F I L E D
Asheville, N. C.
August 30, 1973
U.S. District Court
Western District of N.C.

CARL D. BISHOP Plaintiff v. W. H. WOOD, Chief of Police of the City of Marion, North Carolina, and others, Defendants	MEMORANDUM OF DECISION

The plaintiff, a former police officer of the City of Marion, North Carolina, brings this action against the defendants, W. H. Wood, Chief of Police, Victor Denton, City Manager, and the City of Marion, a municipal corporation, under 42 U.S.C.A., 1983 and 28 U.S.C.A., 1343(3), contending that his Fifth and Fourteenth Amendment rights were violated when he was discharged from his job. He seeks an order requiring the defendants to re-employ him and a monetary award of damages consisting of his wages from March 31, 1972, to the date of judgment.

Both parties have moved for summary judgment and filed affidavits and briefs. After full consideration of the pleadings, briefs, affidavits, and oral arguments, the Court now enters its findings and conclusions.

The parties agree that the plaintiff was employed by the City of Marion as a police officer on the 9th day of June, 1969, and was discharged from such employment on March 31, 1972, by the defendant, Victor Denton, City Manager, upon the recommendation of the defendant, W. H. Wood, Chief of Police. There was no written contract of employment, nor was there any agreement as to the terms of such employment. All newly employed policemen are on a probationary period for six months and afterwards are considered permanent employees. It is the practice and policy of the Police Department of the City to conduct a training program for new policemen and to require them to take training courses provided by the Community College and other institutions. The plaintiff was not given a formal hearing prior to dismissal, but was advised orally by the City Manager that he was to be dismissed upon the complaint of his superior, the Chief of Police.

The plaintiff contends that he was entitled to notice and a formal hearing before being discharged, and that the failure of the defendants to provide such notice and hearing violated his constitutional rights of due process as guaranteed by the Fifth and Fourteenth Amend-

ments. The facts as to why the plaintiff was discharged are in dispute. The Chief of Police and the City Manager contend that the plaintiff was discharged because of his failure to abide by the rules and regulations of the Police Department, particularly with regard to high speed automobile pursuits outside the city limits, his failure to check business establishments, and his failure to attend police training sessions. The plaintiff denies these allegations and offers evidence tending to show his compliance with the department's rules and regulations.

Article II, Section 6, of the Personnel Ordinance of the City of Marion, reads as follows:

> "Dismissal. A permanent employee whose work is not satisfactory over a period of time shall be notified in what way his work is deficient and what he must do if his work is to be satisfactory. If a permanent employee fails to perform work up to the standard of the classification held, or continues to be negligent, inefficient, or unfit to perform his duties, he may be dismissed by the City Manager. Any discharged employee shall be given written notice of his discharge setting forth the effective date and reasons for his discharge if he shall request such a notice."

The record discloses that the plaintiff was given oral notice of and reasons for his discharge, and, upon request, was given written notice and reasons for such discharge. There is no contention that the provisions of this Article were not complied with by the defendants.

The plaintiff contends that under the teachings of Perry v. Sindermann, 408 U.S., 593, 92 S.Ct. 2694, 33 L.Ed. 2d 579, he was entitled to continued employment and therefore entitled to constitutionally required notice and hearing before dismissal, and that since such rights were denied him he is entitled to judgment as a matter of law. On the other hand, defendants contend that the plaintiff was serving at the will and pleasure of the city, and that he had no property right in his continued employment as a policeman, and that notice and hearing prior to dismissal are not constitutionally required. On the basis of the admitted facts, it therefore appears the sole question for determination by this Court is whether the plaintiff was entitled to notice and hearing prior to his dismissal from the police force of the City of Marion. Therefore, summary judgment is now appropriate in this cause.

The plaintiff does not allege any violation of his First Amendment rights, but contends that he has acquired a property right in his employment which is protected by the Fourteenth Amendment.

He relies upon Perry v. Sindermann, supra, for his position that a public employee who has a legitimate claim to continued employment is entitled to a notice and hearing consistent with procedural due process standards before his employment constitutionally can be terminated. He contends that after the six months probationary period he became a permanent employee, and that several police officers have been employed by the city on a continued basis for many years, and that he therefore acquired tenure or at least acquired the right to expect continued employment.

The defendants contend that the plaintiff was serving at the will of the city, and that he had acquired no property right in such employment which would be protected by the Fifth or Fourteenth Amendments. They contend that the plaintiff was subject to dismissal without notice and hearing so long as it was not in retribution for an exercise of some constitutionally protected right.

The plaintiff's reliance upon Perry v. Sindermann, supra, is misplaced, as that case is clearly distinguishable from the case at bar. First, Sindermann alleged that his discharge was based upon his testimony before the Texas legislature and his public disagreements with the policies of the Board of Regents of the College. He thus contended that he was discharged for the exercise of his First

Amendment rights. No such allegation or contention appears in the case at bar. Second, the Supreme Court struck down the Circuit Court's holding that a mere subjective expectancy of continued employment is protected by procedural due process, and held that the plaintiff, a professor with 10 years of service, should not be foreclosed from proving his entitlement to tenure based upon the rules and understandings officially promulgated and fostered. On the same day, the Supreme Court decided Board of Regents of State Colleges v. Roth, 408 U.S., 564, 92 S.Ct. 2701, 33 L.Ed. 2d 548, and held that a professor, with one year of service, was not denied his constitutional rights of liberty and property without due process when the university failed to give him a statement of reasons and provide a hearing on its decision not to re-hire him for another year. The Court said:

> "It stretches the concept too far to suggest that a person is deprived of 'liberty' when he simply is not rehired in one job but remains as free as before to seek another. Cafeteria Workers v. McElroy, supra, 367, U.S. at 895-896, 81 S.Ct. at 1748-1749, 6 L.Ed. 2d 1230."

Here, as in Roth, there is no suggestion whatever that the plaintiff's loss of his "good name, reputation, honor or integrity" is at stake. There is nothing involved except one job with the city, and the plaintiff remains free to seek another job. The court said in

Roth, with reference to property interests:

> "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims.
>
> "Property interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law - rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." 92 S.Ct. 2709.

Under the law in North Carolina, nothing else appearing, a contract of employment which contains no provision for the duration or termination of employment is terminable at the will of either party irrespective of the quality of performance by the other party. By

statute, G.S. 115-142(b), a County Board of Education in North Carolina may terminate the employment of a teacher at the end of the school year without filing charges or giving its reasons for such termination, or granting the teacher an opportunity to be heard. Still v. Lance, 279 N.C., 254, 182 S.E. 2d 403 (1971).

It is clear from Article II, Section 6, of the City's Personnel Ordinance, that the dismissal of an employee does not require a notice or hearing. Upon request of the discharged employee, he shall be given written notice of his discharge setting forth the effective date and the reasons for the discharge. It thus appears that both the city ordinance and the state law have been complied with.

It further appears that the plaintiff held his position at the will and pleasure of the city.

In Hodgin v. Noland, 435 F. 2d 859 (4th Cir. 1970), the plaintiff, a city librarian, was discharged without notice and hearing. The court held:

> "We conclude that the trial judge was correct in instructing that the defendants were not required to give such a formal notice or to provide a hearing. As city librarian, Mr. Hodgin held his position at the will and pleasure of the city. There was no contractual or other

> arrangement limiting the right of termination. Accordingly, he was subject to summary discharge with or without cause, so long as it was not in retribution for an exercise by him of some constitutionally protected right." (Citations omitted.)

In Brown v. Hirst, 443 F. 2d 899 (4th Cir. 1971), the court followed Hodgin and affirmed the district court in dismissing the complaint of a city employee who alleged he had been fired without a hearing in violation of due process. The court said:

> "Appellant worked for the City of Roanoke, and the city charter gives appellee, as the city manager, the 'power to discipline and remove' any city employee. Thus, as in Hodgin, the appellant in the instant case was employed at the will and pleasure of the city and thus was subejct to dismissal so long as it was not in retribution for an exercise of some constitutionally protected right."

The Fourth Circuit has spoken on this question since the Supreme Court decisions in Sindermann and Roth. In

Chitwood v. Feaster, 468 F. 2d 359 (4th Cir. 1972), non-tenured teachers not rehired by a state college in West Virginia contended they were entitled to a statement of reasons for failure to renew their contract and that they should have been given notice and a hearing before the decision not to renew became final. Chief Judge Haynsworth, speaking for the court, said:

> "The first contention has been foreclosed by a subsequent decision of the Supreme Court in Board of Regents of State Colleges v. Roth, 408 U.S., 564 92 S.Ct. 2701, 33 L.Ed. 2d 548. These teachers were not tenured and there was no basis for any reasonable expectancy of permanent employment. While the college might have dealt with them more frankly, under Roth, they had no constitutional right to a statement of reasons for the failure to renew their contracts or to an opportunity for an administrative hearing."

In Johnson v. Fraley, 470 F. 2d 179 (4th Cir. 1972), the court held that a public school teacher who had been so employed on a continuous basis for 29 years, and who was dismissed without notice and hearing allegedly contrary to the Board's own regulation and State law was entitled to be heard on implied tenure. The court, in Kota v. Little, 473 F. 2d 1 (4th Cir. 1973), followed Roth and Chitwood relative to the re-

employment of an untenured professor.

The plaintiff's dismissal was not for impermissible constitutional reasons such as race or religion, or for retribution for the exercise of other First Amendment rights, and such dismissal did not result in deprivation of his liberty in any form, nor did it interfere with a property right. He had no tenure, and the city had not created by regulation or policy, any condition in which its employees could expect continued employment. Since his dismissal resulted in no deprivation of an interest or right protected by the Fifth or Fourteenth Amendments, he was not entitled to a formal hearing prior to said dismissal. The defendants are therefore entitled to a dismissal of the action, and their Motion for Summary Judgment will be allowed. An order dismissing the action will be entered simultaneously herewith.

This the 29th day of August, 1973.

/s/ Woodrow W. Jones
Chief Judge,
United States District Court

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF NORTH CAROLINA

SHELBY DIVISION

CIVIL NO. SH-72-78

CARL D. BISHOP, Plaintiff, v. W. H. WOOD, Chief of Police of the City of Marion, North Carolina, and others, Defendants.	F I L E D Asheville, N.C. August 30, 1973 U.S. District Court Western District of N.C. O R D E R

THIS MATTER is before the Court upon Motions for Summary Judgment filed by the plaintiff and the defendants; and

It appearing to the Court that the defendants' Motion should be allowed for the reasons set forth in the Memorandum of Decision filed simultaneously herewith,

IT IS, THEREFORE, ORDERED that the defendants' Motion for Summary Judgment, be, and the same is hereby allowed, and plaintiff's action is hereby dismissed.

This the 29th day of August, 1973.

/s/ Woodrow W. Jones
Chief Judge,
United States District Court

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NO. 73-2240

CARL D. BISHOP, Plaintiff v. W. H. WOOD, Chief of Police of the City of Marion, North Carolina, and others, Defendants	DECISION

Appeal from the United States District Court for the Western District of North Carolina; Woodrow Wilson Jones, Chief Judge.

J. David James, Greensboro, N. C. (Norman B. Smith, Smith, Carrington, Patterson, Follin & Curtis, Greensboro, N. C., on brief), for plaintiff-appellant.

Charles E. Burgin, Marion, N. C. (Dameron & Burgin, Marion, N. C., on brief), for defendants-appellees.

Before Bryan, Senior Circuit Judge, and Winter and Widener, Circuit Judges.

PER CURIAM:

Upon consideration of the record, the briefs, and oral argument, we are of opinion the judgment below was correct,

and affirm on the opinion of the district court, 377 F.Supp. 501 (W.D.N.C. 1973).

Affirmed.

Winter, Circuit Judge (dissenting):

Unlike my co-panelists, I think that Board of Regents v. Roth, 408 U.S. 564, 92 S.Ct. 2701,33 L.Ed.2d 548 (1972), and Perry v. Sindermann, 408 U.S. 593, 92 S. Ct. 2694, 33 L.Ed.2d 570 (1952), not only foreclosed the entry of summary judgment for defendants, but require that, if summary disposition is to be made, plaintiff should be adjudged entitled to recover damages from defendants in an amount subsequently to be assessed. I therefore respectfully dissent.

Plaintiff was employed as a policeman for more than thirty-three months by the City of Marion, North Carolina. He was dismissed by the City Manager upon the complaint of the Chief of Police for unsatisfactory work, failure to attend training school, "insubordination," and the commission of "acts unsuited to a police officer." Admittedly, the plaintiff was not given notice that there were grounds allegedly sufficient to discharge him, nor was he given a hearing to determine if those grounds were well grounded. He was given written notice of his discharge, but all of the reasons therefor were not set forth. In short, if plaintiff was entitled to be afforded procedural due process, it was clearly denied him; he was given neither notice nor a hearing.

As I read Roth and Sindermann, plaintiff was entitled to recovery under either or both of two theories. In my view, he had been deprived of an interest in "property" and he had been deprived of his "liberty."

Roth and Sindermann make clear that the right to tenure is a "property" interest entitled to the protection of procedural due process. Plaintiff possessed such a right. Under the ordinances of the City of Marion which governed his employment, newly hired policemen are probationary employees for six months. After then they become permanent employees, and a permanent employee may be discharged only if he "fails to perform work up to the standard of the classification held, or continues to be negligent, inefficient, or unfit to perform his duties [after he has been first 'notified in what way his work is deficient and what he must do if his work is to be satisfactory']." Article II, § 6, Personnel Ordinance of the City of Marion. I can only read this ordinance as giving plaintiff a right to continuing employment unless there be good cause for his dismissal. This continuing right is tantamount to tenure; hence, my conclusion that plaintiff had a "property" right to his employment entitling him to procedural due process protection.

Even if plaintiff lacked a property right in his job, there can be no question that the circumstances of his dismissal from public employment injured

certain interests embraced within the concept of "liberty" found in the fourteenth amendment. In Roth, the Court quoted from Wisconsin v. Constantineau, 400 U.S. 433, 437, 91 S.Ct. 507, 510, 27 L.Ed.2d 515 (1971), that "[w]here a person's good name, reputation, honor or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential." 408 U.S. at 573, 92 S.Ct. at 2707. Defendants' affidavits admit that plaintiff was dismissed, inter alia, because of "insubordination" and "conduct unsuited to a police officer." Accusations of this nature made against one engaged in the occupation of a law enforcement officer manifestly have a severe adverse impact upon future employment opportunities, and it can be reasonably expected that defendants would disclose these reasons upon the request of a person considering plaintiff's employment who inquired of the respects in which plaintiff's work had been found unsatisfactory. To my mind, it therefore follows that procedural due process should apply, and as a minimum plaintiff should have been given notice of and afforded an opportunity to refute the charges before he was dismissed.

I add a word about the jurisdiction of the district court. Plaintiff joined the City of Marion, North Carolina, as a party-defendant, together with the Chief of Police and the City Manager. Jurisdiction was alleged to exist under 42 U.S.C. § 1983; 28 U.S.C. §§ 1331(a) and 1343(3). Of course, Monroe v. Pape, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492

(1961), and City of Kenosha v. Bruno, 412 U.S. 507, 93 S.Ct. 2222, 37 L.Ed.2d 109 (1973), hold that the City of Marion is not a "person" within the meaning of 42 U.S.C. § 1983, and therefore the district court lacked jurisdiction over the claim against the City under 28 U.S.C. § 1343(3). Jurisdiction as to the individual defendants unquestionably existed. But, as to the City, plaintiff alleged a deprivation of his right to procedural due process under the fourteenth amendment, and the district court had jurisdiction under 28 U.S.C. §1331(a), provided there was the requisite amount in controversy. Whether $10,000 is at issue is sharply contested on the theory that plaintiff's back pay claim after mitigation of damages will not reasonably amount to $10,000. The short answer is that the district court had pendent jurisdiction over the claim against the City arising directly under the fourteenth amendment by reason of the intimate connection of that claim with the § 1983 claim against the other defendants. The Second Circuit has held that the doctrine of pendent jurisdiction applies even where the defendant to the pendent claim is not a defendant to the claim conferring jurisdiction, and I would follow its lead. Leather's Best, Inc. v. S.S. Mormaclynx, 451 F.2d 800, 809-811 (2Cir. 1971).

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NO. 73-2240

F I L E D
January 31, 1975
William K. Slate, II
Clerk

CARL D. BISHOP, Appellant,

v.

W. H. WOOD, Chief of Police
of the City of Marion, North Carolina;
VICTOR DENTON, City Manager of the
City of Marion, North Carolina;
and the City of Marion, North Carolina,
a municipal corporation,

Appellees

ORDER

The judgment of the district court is affirmed by an equally divided court.

For the Court:

/s/ Harrison L. Winter
United States
Circuit Judge